Office - Supreme Court, U.S.
FILED
OCT 4 1982
ALEXANDER L. STEVAS,
CLERK

82-596

No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

RUSSELL BUFALINO,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CHARLES P. GELSO
120 South Franklin Street
Wilkes-Barre, Pennsylvania, 18701
(717) 826-1401

ROY COHN
Saxe, Bacon & Bolan, P.C.
39 East 68th Street
New York, New York 10021
(212) 472-1400

Counsel for Petitioner

Questions Presented

1. Whether the provision of the Speedy Trial Act which requires the trial court to promptly dispose of pretrial motions was violated when the trial court delayed approximately seven months in deciding an unopposed Government Motion to Sequester the Jury?

2. Whether a defendant can be deemed to have waived his rights under the Speedy Trial Act by not responding to a Government Motion to Sequester the Jury which he did not oppose?

3. Whether an admittedly erroneous instruction to the jury which prohibited their consideration of crucial impeachment evidence against the Government's two main witnesses by eliminating from the jury's consideration plea bargain benefits, immunity and payments made to those witnesses, can be rendered harmless by the summation of counsel?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

CITATION TO OPINION BELOW 1

JURISDICTION 1

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING CERTIORARI 5

I. The Circuit Court's interpretation of the excludable period for pretrial motions under the Speedy Trial Act, which allowed the trial court to delay trial by sitting on an uncontested Government Motion to Sequester the Jury for a period of seven months, creates a loophole in the provisions of the Act which is contrary to the legislative intent and which undermines the policy of the Act 5

II. The decision of the Circuit Court that the defendant cannot claim relief under the provisions of the Speedy Trial Act because he did not respond to a Government motion which he did not oppose is tantamount to a holding that the defendant's lack of response to the uncontested motion constitutes a waiver of his rights under the Speedy Trial Act, despite clear legislative intent against such waiver 9

III. The decision of the Circuit Court that an admittedly erroneous jury instruction which prohibited the jury from considering crucial impeachment evidence against the Government's two accomplice witnesses can be rendered harmless by the summation of counsel is in direct conflict with a decision of the Fifth Circuit Court of Appeals on the same issue 12

CONCLUSION 14

APPENDIX:

Opinion of the Court of Appeals 1a

Judgment of the Court of Appeals 20a

Order Denying Petition for Rehearing 21a

Statutes Involved 22a

TABLE OF AUTHORITIES

Cases:

United States v. *Bernard*, 625 F.2d 854 (5th Cir. 1980) .. 13

Statutes:

Title 18, United States Code

Section 241 2

Section 371 2

Section 1503 2

Section 3161 ..... *passim*, 22a

Section 3161(h)(1)(F) 5, 6, 11

Section 3161(h)(1)(J) 6

Rules:

Supreme Court Rule 21.1(f) 2

Rule 3, Local Rules for the Southern District of New York 2, 10, 23a

Administrative Office Speedy Trial Issuance No. 33 August 1981) 8, 11

Second Circuit: Guidelines Under the Speedy Trial Act (January 16, 1979) 8, 23a

Other Authorities:

H.R. Rep. No. 96-30, 96th Cong., 1st sess. (1979), reprinted in 1979 U.S. Code Cong. and Admin. News 805, 814 7

Misner, the 1979 amendments to the Speedy Trial Act: Death of the Planning Process, 32 Hast. L.J. 635, 655 (1981) 7

S. Rep. No. 96-212, 96th Cong., 1st sess. 33-34 1979, reprinted in Fed. Judicial Center, Legislative History of Title 1 of the Speedy Trial Act 115 (1980) 7, 9, 10

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

RUSSELL BUFALINO,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, Russell Bufalino, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on June 15, 1982.

Citation to Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit in this case is cited as *United States* v. *Bufalino*, Docket No. 81-1474, 683 F.2d 639 (2d Cir. 1982), and the opinion appears in the Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on June 15, 1982. A timely Petition for Rehearing and Suggestion for Rehearing En Banc were denied on August 4, 1982, and this Petition for Certiorari was filed within sixty (60) days of that date, in accordance with Rule 20.1 of the Rules of the Supreme Court of the United States. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

Statutes Involved

As provided by Supreme Court Rule 21.1.(f), the verbatim quotations of the pertinent portions of 18 U.S.C. Section 3161; Rule 3 of the Local Rules for the Southern District of New York; and Second Circuit: Guidelines under the Speedy Trial Act are set forth in the Appendix hereto.

Statement of the Case

On December 30, 1980, a Federal Grand Jury sitting in the Southern District of New York returned a one count indictment charging Russell Bufalino with Conspiracy to Obstruct Justice in violation of 18 U.S.C. Section 371. This indictment was superseded on April 2, 1981 by an indictment charging one count of Conspiracy against the Rights of Citizens in violation of 18 U.S.C. Section 241 and Obstruction of Justice in Violation of 18 U.S.C. Section 1503.[1]

Bufalino was arraigned on January 9, 1981. On March 9, 1981, he filed his first set of pretrial motions and the Government responded to those motions on March 24, 1981. On March 27, 1981, the Government filed a pretrial Motion to Sequester the Jury. The Defendant did not oppose this motion and therefore filed no response.

On April 30, 1981, after the filing of the superseding indictment, Bufalino filed his second set of pretrial motions. The Government responded to those motions on May 26, 1981.

Since no hearings were granted on any pretrial motions, all contested motions were under advisement by May 26, 1981 and under the provisions of the Speedy Trial Act, the 30 day ex-

[1]The original indictment was not dismissed until the conclusion of trial.

cludable period for motions under advisement ended on June 25, 1981. On July 28, 1981, the trial court disposed of all pretrial motions except for the Government's uncontested Motion to Sequester the Jury.

On September 30, 1981, Bufalino filed a motion to dismiss the indictment under the provisions of the Speedy Trial Act, which motion was denied on that same date by the trial court.

The trial court finally granted the Government's unopposed Motion to Sequester the Jury on October 19, 1981, approximately seven (7) months after the motion was filed. Trial commenced on October 19, 1981, 283 days after the date Bufalino was arraigned, and 116 days after the excludable period for contested pretrial motions had ended.

At trial, the Government's evidence against Bufalino consisted primarily of the testimony of two accomplice witnesses, James Fratianno and Stephen Fox. The Defendant testified on his own behalf, and the primary determination to be made by the jury involved weighing the credibility of the Government's accomplice witnesses against that of the Defendant Bufalino.

Both of the Government's accomplice witnesses received substantial benefits in exchange for their cooperation. Fratianno was on the Witness Protection Program and had received benefits totaling approximately $200,000.00, $50,000.00 of which was paid shortly before this trial. Fratianno had been charged with a number of crimes including a number of murders. As a result of his cooperation with the Government, Fratianno was released from prison after serving approximately 21½ months. The other accomplice witness, Stephen Fox, was also offered an opportunity to participate in the Witness Protection Program and he hoped to obtain an early parole as a result of his cooperation.

Bufalino's case to a large extent rested on his attack on the credibility of the Government's accomplice witnesses. The focus

of that attack was that Fratianno and Fox testified favorably for the Government because of the enormous benefits they received for their cooperation.

Bufalino requested the Court to charge the jury that the testimony of Fratianno and Fox should be scrutinized with care and caution and that the jury should consider whether their testimony was affected by the benefits they received from the Government in the form of plea agreements, immunity and witness payments.

The trial court did not give the charge as requested but rather specifically instructed the jury that in determining the credibility of these witnesses the jury could only consider the witness's interest in the outcome of the case and not his interest in testifying. Specifically, the trial court instructed the jury as follows:

> "If you find, however, that an informer believes that he has a real interest in the *outcome* of this case, then you consider that, also, in determining his credibility.
>
> For example, if a person here, informer, believes that his term of imprisonment may be shortened, not because of his testimony, but because of the outcome of the case, all right, then he has a real interest in the case."

Since the interest of Fox and Fratianno stemmed from the benefits they received in exchange for their testimony, and regardless of the ultimate outcome of the case, this instruction by the court had the effect of eliminating from the jury's consideration in determining the credibility of these witnesses, all of the benefits which Fox and Fratianno received in the form of reduced sentences, immunity and witness payments.

Bufalino took specific exception to the court's instruction to the jury. However, the trial court did nothing to correct the error and on October 22, 1981, the jury returned a verdict of guilty against Bufalino on both counts of the indictment.

Reasons for Granting Certiorari

I.

The Circuit Court's interpretation of the excludable period for pretrial motions under the Speedy Trial Act, which allowed the trial court to delay trial by sitting on an uncontested Government Motion to Sequester the Jury for a period of seven months, creates a loophole in the provisions of the Act which is contrary to the legislative intent and which undermines the policy of the Act.

This case contains an important issue of first impression concerning the interpretation of the excludable period for pretrial motions under the Speedy Trial Act. (18 U.S.C. Section 3161 et seq. hereinafter referred to as the "Act"). Specifically, the Court of Appeals by ignoring that provision of the Act requiring "prompt disposition" of pretrial motions has interpreted the Act so as to create a loophole which allowed the trial court to sit on a simple uncontested Government Motion to Sequester the Jury for almost seven months and delay the start of trial far beyond the period contemplated by the Speedy Trial Act.

The Government filed its Motion to Sequester the Jury on March 27, 1981.[2] Bufalino did not respond to the Motion since he did not oppose sequestration. Although the trial court disposed of all other pretrial motions on July 28, 1981, the sequestration motion was not disposed of until the first day of trial, October 19, 1981, some seven months after it was filed.

There are two provisions in the Act governing the excludable period for pretrial motions. 18 U.S.C. Section 3161 (h)(1)(F) (hereinafter referred to as "Subsection (F)") excludes that period from the filing of the motion to its "prompt disposition".

---

[2]This was 18 days after the deadline established by the trial court for filing pretrial motions.

18 U.S.C. Section 3161 (h)(1)(J) (hereinafter referred to as "Subsection (J)"), further limits the excludable time by providing that once a motion comes under advisement a maximum of thirty days shall be excluded.

The Court of Appeals held that since no response was filed to the Government sequestration motion, that motion was never under advisement and the entire seven-month period from the filing of the motion until its ultimate disposition on the day of trial is excludable under the Act.

The decision of the Court of Appeals completely ignores Subsection (F) which limits the excludable period for pretrial motions to that time which is reasonably necessary to effect a "prompt disposition" of the motion. The ruling of the Court of Appeals renders meaningless the "prompt disposition" language of Subsection (F) and effectively relieves the trial court of the burden of promptly disposing of pretrial motions.

If the decision of the Court of Appeals is allowed to stand, the trial court will have unlimited discretion in determining a timetable for the disposition for pretrial motions and consequently unlimited discretion in the scheduling of criminal trials. Such a holding severely undermines the policy of the Speedy Trial Act.

The exact problem created by the decision of the Court of Appeals in this case was contemplated when the 1979 amendments to the Act were considered.

As originally enacted, the Act excluded only those court days actually consumed in the disposition of pretrial motions. Fearing the exclusion too restrictive, the legislature amended the Act in 1979 and allowed an exclusion from the filing of pretrial motions to hearing or other "prompt disposition".

The Senate Committee Report approving the amendment cautioned:

> "Nor does the Committee intend that additional time be made eligible for exclusion by postponing hearing date or other prompt disposition of the motion *beyond what is reasonably necessary*". S. Rep. No. 96-212, 96th Cong., 1st sess. 33-34 1979, reprinted in Fed. Judicial Center, Legislative History of Title 1 of the Speedy Trial Act 115 (1980). (Emphasis added.)

The Senate Committee Report went on to observe that this amendment "could become a loophole which could undermine the whole Act". The Committee suggested that each court adopt procedures setting a specific timetable for the filing of pretrial motions. S. Rep. No. 96-212, supra, p. 34.

Similarly, the House Committee Report recognizing possible abuse of this exclusion stated that the amendment was approved

> ". . . with the intention that potentially excessive and abusive use of the exclusion be precluded by district or circuit guidelines, rules or procedures relating to motions practice". H.R. Rep. No. 96-30, 96th Cong., 1st sess. (1979), reprinted in 1979 U.S. Code Cong. and Admin. News 805, 814.

Professor Robert L. Misner also recognized the possible loophole created by the 1979 amendments and stated:

> "By joining these two provisions, the Government or defense counsel may file motions that toll the time, or the judge may take virtually any amount of time in setting the motion for hearing or for taking the motion under advisement. The only limitation on the judge is that the hearing or disposition of the motion must be 'prompt'. The discretionary aspect of 'promptness' returns to the criminal process the type of discretion Congress originally intended to limit in the Act". Misner, the 1979 amendments to the Speedy Trial Act: Death of the Planning Process, 32 Hast. L.J. 635, 655 (1981).

As stated in both the Senate and House Committee Reports above-cited, possible abuse which could result from the uncertainty as to what constitutes "prompt disposition" of pretrial motions could be precluded by district or circuit guidelines regulating motions practice. The Second Circuit has adopted such guidelines establishing a pretrial motion timetable and requiring that any response to pretrial motions be filed within ten days. Second Circuit: Guidelines Under the Speedy Trial Act (January 16, 1979).

The Circuit Court held that since the decision of the trial court on the sequestration motion hinged on the defendant's position relative to that Motion, it was reasonable for the trial court to wait to hear from the defendant before finally disposing of the Motion. While that may be true, there was certainly no excuse for waiting seven months for the defendant's response. It is relatively standard practice for a trial court to presume that a party who does not respond to a motion, does not oppose that motion. Since the Second Circuit guidelines allow ten days for responding to pretrial motions, to hold that the trial court was justified in waiting seven months for the defendant's response is totally unreasonable and makes a mockery of the Act.

It was clearly the intention of the legislature to place a burden on the trial court to promptly dispose of pretrial motions so as not to delay the scheduling of a criminal trial. Administrative Office Speedy Trial Issuance No. 33 (August 1981) at p. 55. When the trial court in this case delayed seven months in disposing of the Government's uncontested Motion to Sequester the Jury, it can hardly be said that the court met its burden of promptly disposing of pretrial motions.

When the Government filed its sequestration motion and no response was received within ten days as prescribed by the Second Circuit Guidelines, the motion should have been considered "under advisement" for the purpose of triggering the maximum thirty-day excludable period under Subsection (J). Certainly,

this interpretation of what constitutes "prompt disposition" is more reasonable and more in keeping with the legislative intent than the interpretation suggested by the Court of Appeals when it determined that there was prompt disposition when the trial court delayed trial while it sat back and waited seven months for the defendant to file a response to the Government's Motion to Sequester the Jury.

The primary objective of the Speedy Trial Act is the "protection of the societal interest in speedy disposition of criminal cases by preventing undue delay in bringing such cases to trial". S. Rep. No. 212, supra, at 28-29.

To allow the decision of the Court of Appeals to stand is to allow a loophole in the Act which will give trial courts complete discretion in the scheduling of criminal trials. Such an interpretation is contrary to legislative intent and will greatly undermine the purpose of the Act which is to compel trial courts to promptly dispose of criminal cases.

II.

The decision of the Circuit Court that the defendant cannot claim relief under the provisions of the Speedy Trial Act because he did not respond to a Government motion which he did not oppose is tantamount to a holding that the defendant's lack of response to the uncontested motion constitutes a waiver of his rights under the Speedy Trial Act, despite clear legislative intent against such waiver.

The Court of Appeals held that the trial court's delay of seven months in deciding the Government's Motion to Sequester the Jury was somehow caused by the defendant's failure to respond to that motion. In effect, the Appeals Court ruled that Bufalino by not responding to a motion he did not oppose, waived his right to have that motion promptly disposed of and consequently

waived his right to a prompt trial. Although the Circuit Court explicitly denied that its ruling should be construed in terms of a waiver, no other interpretation is possible.

Since the Speedy Trial Act was enacted to protect the societal interest in the prompt disposition of criminal cases, it is contrary to the purpose of the Act to hold that mere inaction by a defendant with respect to a Government motion which he did not oppose, could constitute a waiver of the provisions of the Act and a waiver of society's interest in the prompt disposition of his trial.

The Senate Committee Report on the 1979 amendments to the Act stated:

> "The Committee wishes to state, in the strongest possible terms, that any construction which hold that any of the provisions of the Speedy Trial Act is waivable by the defendant, other than his statutorily-conferred right to move for dismissal as cited above, is contrary to legislative intent and subversive of its primary objective". S. Rep. No. 212, supra, at 28-29.

The Circuit Court's holding in this case that Bufalino by not responding to a motion he did not oppose, had no right to expect prompt disposition of that motion, is clearly subversive of the primary objective of the Speedy Trial Act.

In any event, since a defendant has no obligation to respond to a motion he does not oppose, and since it is clearly the obligation of the moving party, in this case the Government, to see that its motion is disposed of, it is submitted that there is no basis for the Circuit Court's ruling.

In fact, Rule 3 of the Local Rules of Procedure in criminal cases for the Southern District of New York specifically requires that a moving party, in this case the Government, determine

prior to filing any motion, whether there is opposition to that motion. If blame is to be placed on any party, then it should be placed on the Government for failure to comply with this Rule and for failure to prosecute its own motion.

As stated previously, it is standard practice that when a party does not file a response to a motion, he is presumed not to oppose that motion. Here when Bufalino did not respond to the sequestration motion within the ten days prescribed by the Second Circuit Guidelines, the trial court should have presumed that Bufalino did not oppose sequestration. Certainly, when months began to go by after the filing of the motion, the trial court had no reason to expect that Bufalino opposed the motion or intended to file a response.[3]

In conclusion, this Court should review the decision of the Second Circuit and in keeping with the primary objective of the Speedy Trial Act, make it clear that the societal interest in prompt disposition of criminal trials cannot tolerate a seven-month delay while the trial court waits for the defendant to respond to a Government motion which he does not oppose.

---

[3]Administrative Office Speedy Trial Advisory Issuance No. 33 (August 1981) defines the end of the excludable period for pretrial motions under subsection (F) as that time when the Court received everything it expected to receive from the parties before rendering a decision. Also, it should be noted that the trial court never asked the defendant for his position on the sequestration motion until a pretrial conference held three weeks before the start of trial at which time the defendant advised the Court that he did not oppose sequestration.

III.

The decision of the Circuit Court that an admittedly erroneous jury instruction which prohibited the jury from considering crucial impeachment evidence against the Government's two accomplice witnesses can be rendered harmless by the summation of counsel is in direct conflict with a decision of the Fifth Circuit Court of Appeals on the same issue.

The evidence against Bufalino in this case consisted of the testimony of two Government witnesses, Fratianno and Fox. Substantial impeachment evidence was introduced at trial with respect to both of these witnesses. That evidence consisted of actual benefits received or promised in exchange for their testimony. With respect to Fratianno, the evidence showed that he was placed on a Witness Protection Program and received $200,000.00 in benefits, $50,000.00 of which was paid to him shortly before trial in this case. In addition, pursuant to a plea bargain, Fratianno entered guilty pleas to a number of crimes, including a number of murders and as a result of the intercession of the Government, served only 21½ months of incarceration. Fox also was offered an opportunity to participate in the Witness Protection Program and hoped to obtain an early parole as a result of his testimony.

Bufalino requested the Court to charge the jury that the testimony of Fratianno and Fox should be scrutinized with care and caution and that the jury should consider whether their testimony was affected by the benefits they received from the Government in the form of plea agreements, immunity and witness payments.

The Court did not give the charge as requested but rather instructed the jury that they could only consider those benefits received by the witness as a result of the outcome of the case, thus eliminating from the jury's consideration the bulk of the impeachment evidence.

Specifically, the trial court instructed the jury as follows:

> "If you find, however, that an informer believes that he has a real interest in the *outcome* of this case, then you consider that, also, in determining his credibility.
>
> For example, if a person here, informer, believes that his term of imprisonment may be shortened, *not because of his testimony but because of the outcome of the case,* all right, then he has a real interest in the case." (Emphasis added.)

The Second Circuit apparently agreed that this instruction was "equivocal" and "inadequate". However, the Court held that this erroneous instruction was rendered harmless by the defense summation attacking the credibility of these witnesses.

Although it is admitted that the failure to give an accomplice instruction is not reversible error in every case, it is submitted that when the Court's instruction to the jury serves not to call into question the credibility of an accomplice but rather bolsters that credibility by excluding from the jury's consideration crucial impeachment evidence, then, in such a case, the charge of the Court has deprived the defendant of a fair trial and should be deemed reversible error.

The holding of the Second Circuit, that the jury could disregard the trial court's erroneous instruction, in favor of defense counsel's summation, is sheer fantasy and in conflict with the principle established by the Fifth Circuit Court of Appeals in the case of *United States* v. *Bernard,* 625 F.2d 854 (5th Cir. 1980).

In *United States* v. *Bernard, supra,* the Defendant argued that the Court's failure to give an accomplice instruction was plain error. The Government responded that any such error was harmless on the theory that the summation arguments of the Defendant's counsel adequately admonished the jury to consider ac-

complice testimony with caution. The Fifth Circuit found this argument "unpersuasive" holding:

> "A jury's response to instructions from the judge is and should be quite different from its response to arguments from counsel. Counsel's argument is neither law nor evidence and the jury is so instructed". (At p. 857)

It is submitted that this Court should review the decision of the Second Circuit in this case to resolve the conflict between circuits as to whether an erroneous jury instruction concerning the credibility of Government witnesses can be cured by the summation of defense Counsel.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

CHARLES P. GELSO
120 South Franklin Street
Wilkes-Barre, Pennsylvania, 18701
(717) 826-1401

ROY COHN
Saxe, Bacon & Bolan, P.C.
39 East 68th Street
New York, New York 10021
(212) 472-1400

Counsel for Petitioner
Russell Bufalino